

DOCKET FILE COPY ORIGINAL

RECEIVED

JUL - 7 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Application by Ameritech Michigan
Pursuant to Section 271 of the
Telecommunications Act of 1996 to
Provide In-Region, InterLATA
Services in Michigan

)
)
)
)
)
)
)
)
)
)

CC Docket No. 97-137

**REPLY OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES**

Richard J. Metzger
General Counsel
Association for Local
Telecommunications Services
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 466-3046

July 7, 1997

No. of Copies rec'd
List A B C D E

46

SUMMARY

Ameritech's current Section 271 application for the state of Michigan has now been judged inadequate by the Michigan Public Service Commission ("MPSC"), the Michigan Attorney General, and the United States Department of Justice. Thus, there is no meaningful question that the present record requires the application be denied.

Unfortunately, Ameritech may not be willing to return to the task of properly complying with Section 271 in Michigan. Instead of discharging its pro-competitive duties, ALTS is concerned that Ameritech will instead attempt to bury the Commission with ex parte submissions following this last round of filings in a desperate attempt to substitute promises for performance.

There would be two basic defects in such an attempt by Ameritech -- or any other Section 271 applicant -- to use post-filing ex partes in an effort to "paper over" defects in its original application. First, such attempts would be procedurally defective because other participants in the proceeding would lack any meaningful opportunity to track down, analyze, and respond to these last-minute claims or promises within the narrow time limits in which the Commission must act. Assertions cannot be tested by the normal adversarial process when applicants make material ex parte submissions following the last opportunity for formal response and only weeks before a mandatory decision date. Accordingly, these submissions could not be relied upon by the

Commission in deciding an application.¹

Second, any use of post-filing ex partes by Ameritech would also be substantively defective, particularly in a Track A application (Section 271(c)(1)(B)), where Congress made operational implementation a prerequisite. Even if Ameritech could show, following the submission of all formal filings, the existence of a material fact that Ameritech was unable to show at the time its original application was filed (and also assuming, contrary to the discussion above, that such an assertion could be relied upon in the absence of adversarial scrutiny), this would only underscore the defective nature of Ameritech's original application.

Indeed, the requirements of sound procedure and Congress' Track A requirements are entirely congruent because the House Committee Report's discussion of the provision which became Section 271 explained that Track A's requirement of an operational facilities-based competitor (H.R. Rep. No. 204 at 76-77): "... is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed

¹ Enforcing proper procedure also works no appreciable prejudice on Ameritech, as its previous Section 271 applications for Michigan amply demonstrate. When Ameritech believed that its original January 2d application was incomplete, it simply refiled on January 17th, thereby triggering a new ninety day period.

If Ameritech really believes that certain new facts or promises will entitle it to obtain approval, all it has to do is to include them in a refile of its current application.

open to competition."² If the Commission were to accept RBOC implementation claims outside the formal record, it would have effectively jettisoned the requirement of a "tangible affirmation."

Thus, while the body of this reply is naturally directed to a discussion of the various points in the record that demonstrate why the application must be denied, perhaps its most valuable function is urge the Commission not to accept any post-filing assurances by Ameritech to the effect that: "Don't worry about any problems, we'll make it all okay!" Ameritech made much of the fact that its original application ran over 10,000 pages and weighed more than two hundred pounds. If there were any facts or promises needed to complete this application, Ameritech surely had the opportunity to provide them then, and should not be afforded the opportunity now to amend its application via ex partes at this late date.

² See Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, released June 26, 1997, quoting this passage with approval (¶ 42).

TABLE OF CONTENTS

SUMMARY	i
I. AMERITECH'S MICHIGAN APPLICATION CANNOT PROCEED UNDER TRACK B	1
II. BROOKS FIBER IS NOT CURRENTLY A TRACK A-COMPLIANT CARRIER	5
III. AMERITECH HAS FAILED TO SHOW COMPLIANCE WITH THE COMPETITIVE CHECKLIST OF SECTION 271(C) (2) (B)	7
A. Ameritech Fails to Provide Adequate Interconnection by Undersizing the Trunks It Uses to Exchange Traffic	7
B. Ameritech Has Failed to Provide Unbundled Switching Or Local Transport	9
C. Ameritech Has Failed to Show that It Provides OSS Support for Unbundled Network Elements or Resale	10
D. Ameritech Has Failed To Demonstrate the Existence of Adequate Performance Measurements or Performance Standards for OSS and Other Checklist Elements	11
IV. AMERITECH HAS FAILED TO DEMONSTRATE THAT LOCAL MARKETS ARE "FULLY AND IRREVERSIBLY OPEN TO COMPETITION"	12
CONCLUSION	14

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
)	
Application by Ameritech Michigan)	
Pursuant to Section 271 of the)	CC Docket No. 97-137
Telecommunications Act of 1996 to)	
Provide In-Region, InterLATA)	
Services in Michigan)	

**REPLY OF THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Services ("ALTS") hereby files this reply, and requests that the Commission deny Ameritech's Section 271 application for the state of Michigan because Ameritech has not complied with the clear requirements of the statute.

**I. AMERITECH'S MICHIGAN APPLICATION
CANNOT PROCEED UNDER TRACK B.**

While Ameritech styles its application as a request under Track A (Section 271(c)(1)(A)), it makes no disclaimer about seeking entry under Track B in the event its Track A request is denied. For the sake of completeness, ALTS wishes to point out that if a "fall-back" request under Track B can be inferred from Ameritech's application, such a request would be barred by

Section 271 as recently interpreted by the Commission in Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, released June 26, 1997 ("SBC Oklahoma Section 271 Order").

SBC argued in its Oklahoma Section 271 application that Section 271 confers considerable discretion on the RBOCs in seeking Track B approval. The Commission discussed SBC's claims at length in its SBC Oklahoma Section 271 Order, and concluded that (id. at ¶ 27):

"All parties appear to agree that, if SBC has received a 'qualifying request for access and interconnection, the statute bars SBC from proceeding under Track B. We agree with this analysis and conclude that, in order to decide whether SBC's application may proceed under Track B, we must determine whether SBC has received a 'qualifying request.' We conclude that a 'qualifying request' under section 271(c)(1)(B) is a request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A) As discussed below, such a request need not be made by an operational competing provider, as some BOCs suggest. Rather, the qualifying request may be submitted by a potential provider of telephone exchange service to residential and business subscribers." (Emphasis supplied.)

The Commission went on to conclude that (id. at ¶ 30): "on the basis of the record before us, we find that SBC has received, at the very least, several qualifying requests for access and interconnection that, if implemented, will satisfy the requirements of section 271(c)(1)(A))."

The Commission's conclusion that Track B is currently barred

in Oklahoma based on the interconnection requests made there requires that Track B also be barred in Michigan. There is no evidence in this record to suggest that the number of interconnection requests in Michigan, the parties making the requests (many of which have requested interconnection in both Michigan and Oklahoma), or their state-specific business plans (in the event any new entrant's plans differ from state to state), are distinguishable in any way from Oklahoma for the purpose of disabling Track B.³

The Commission's SBC Oklahoma Section 271 Order thus disposes of any claim that Ameritech's current application could be considered under Track B. However, while it is not needed to decide the current proceeding, ALTS wishes to point out that it does not insist that all interconnection requests permanently disable the Track B option. Rather, ALTS' position is that the Commission need not attempt to distinguish between the kinds of requests that disable Track B and those that do not until all interconnection requests filed within ten months of the February 8, 1996, passage of the Telecommunications Act of 1996, have been operationally implemented.

³ In arguing that Track B is disabled, ALTS does not rely on DOJ's conclusion that Brooks Fiber already meets the requirements for a predominantly facilities-based new entrant because ALTS disputes this conclusion (see Part II below). However, the fact that Brooks' deployment in Michigan is more advanced than in Oklahoma does underscore the applicability of the Commission's Track B ruling in the SBC Oklahoma Section 271 Order to the present proceeding.

It is the operational implementation of the initial wave of interconnection requests that would provide the Commission with a factual opportunity to discern which new entrants will actually evolve into Track A-compliant interconnectors. Prior to operational implementation of all requests, however, business plans cannot be carved in stone because some interconnection arrangements will prove more successful than others over the course of operational testing. Once testing has been completed, the planning horizon for new entrants should be sufficiently certain (assuming final prices are also in place), that their ultimate business aspirations would be ascertainable at that point.

Moreover, postponing a rigorous definition as to which requests bar Track B until implementation is completed does not prejudice any RBOC, which can negotiate for fixed implementation schedules in its interconnection agreements.⁴ And any RBOCs which omitted to obtain implementation schedules in their original agreements are free to reopen those agreements to obtain them (and to seek arbitration in the event they are turned down), just as new entrants are free to reopen existing agreements to amplify performance measurements and standards.

⁴ See the last sentence of Section 271(c)(1)(B), which removes the disabling effect of interconnection requests where the interconnector unreasonably delays the implementation schedule.

II. BROOKS FIBER IS NOT CURRENTLY A TRACK A-COMPLIANT CARRIER.

As noted above, the Department of Justice in its evaluation concluded that: (id. at 7): "on the specifics of the facts presented, it is reasonable to conclude that Brooks is predominately a facilities-based provider in Michigan for the purposes of Track A." The basis for DOJ's conclusion is contained in two sentences (id.):

"Turning then to Brooks, which is serving both residential and business customers, we observe that Brooks is not serving any of its local customers by resale of Ameritech's services. Ameritech Brief at 12. It provides significant switching and transport of its own, separate from Ameritech, to serve all of its customers, as well as a substantial share of its own loops for both business and residential customers."

With all respect to the Department, these sparse facts fall far short of supporting a finding that Brooks is a "predominately facilities-based" competitor for two significant reasons.

First, the Department's cursory analysis makes no distinction in importance among transport, switching, and loop facilities. This flies in the face of the Department's own recognition on several occasions that loops are the predominant bottleneck facility.⁵ Even more significantly, it turns a blind eye to the fact that the discussion of "predominantly facilities-based" competitors in the Conference Report focused upon cable

⁵ See, e.g., Memorandum of the United States in Support of Its Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech, filed May 1, 1995, at 16; United States v. Western Electric, D.D.C. Civil Action No. 82-0192.

providers because of their possession of alternative loop facilities.⁶

Second, the Department's analysis, such as it is, aggregates residential and business customers together in concluding that Brooks Fiber is a predominantly facilities-based competitor. This ignore the clear statutory requirement that a carrier must qualify for both markets. Rep. Thomas Bliley recently wrote the Chairman of the Commission concerning this contention after DOJ first raised it in the SBC Oklahoma Section 271 proceeding: "[a]s the primary author of this provision, I feel compelled to inform you that the Department misread the statute's plain language the Department wrongly takes the view that section 271(c)(1)(A) is satisfied if a competitor is serving either residential or business customers over its own facilities" (emphasis in the original; letter dated June 20, 1997).

The Commission properly declined to reach this particular issue in its SBC Oklahoma Section 271 Order, and, given the defects and inconsistencies in the Department's analysis of this issue, should also decline to do so here. In the event it does reach this issue, however, ALTS respectfully urges the Commission to reject DOJ's factual conclusion as to Brooks Fiber, and also asks that the Commission recognize Congress' intent that the "facilities-based competitor" requirement be applied to both

⁶ See the Commission's discussion of this history in the SBC Oklahoma Section 271 Order at ¶ 51.

business and residence customers.

**III. AMERITECH HAS FAILED TO SHOW COMPLIANCE WITH
THE COMPETITIVE CHECKLIST OF SECTION 271(C)(2)(B).**

Both the MPSC and DOJ have concluded that Ameritech has failed to comply with all aspects of the competitive checklist set out at Section 271(c)(2)(B). Accordingly, Ameritech's application must be denied. While ALTS agrees with the factual findings of the MPSC and DOJ as to Ameritech's non-compliance with the checklist, it is the Commission's obligation to determine checklist compliance, while giving proper weight to the views of the Department.⁷

A. Ameritech Fails to Provide Adequate Interconnection by Undersizing the Trunks It Uses to Exchange Traffic.

The Department concluded in its evaluation that "Ameritech has failed to provide sufficient evidence to demonstrate that it is providing adequate interconnection in accordance with the technical standards set forth in the 1996 Act" (DOJ Evaluation at 24). According to DOJ (id. at 25):

"During March and April of 1997, 9.4% of the EOI interLATA trunk groups were blocking more than 2% of the traffic routed to the group. Over the same period, 6.6% of the EOI trunk groups used to transport local and intraLATA calls exceeded the 2% threshold that Ameritech reports.*

⁷ As the Commission noted in its SBC Oklahoma Section 271 Order: "Section 271 requires us to consult with the Oklahoma Commission 'in order to verify the compliance of [SBC] with the requirements of [section 271(c)]' before we make any determination on SBC's application under section 271(d). At the same time, as the expert agency charged with implementing section 271, we are required to make an independent determination of the meaning of statutory terms in section 271" (at ¶ 15).

*Affidavit of Warren Mickens ¶ 49 ('Mickens Aff.'), attached to Ameritech Brief, Volume 2.10. The Department notes that some of the charts and underlying raw data presented in Schedule 17 of Mickens proprietary testimony are inconsistent."

DOJ goes on to note that Ameritech's claim that the "varying" nature of CLEC calls or trunk groups might explain the different blocking rates lacks any support in the record (DOJ Evaluation at 26).

Disparity in the quality of interconnection provided lies close to the heart of anticompetitive behavior.⁸ Trunk blocking is not a new or unusually difficult engineering discipline. Where volatile traffic volumes are involved, RBOCs such as Ameritech compensate in their own networks by adequately sizing trunks to handle a broad range of possible "busy hours." But, as DOJ points out, Ameritech apparently has failed to provide the same assurances for the interconnection of CLEC traffic.

Ameritech's inability to produce supporting data for its trunk sizing decisions is fatal to its claim of compliance. Absent supportable estimates, Ameritech cannot show reasonable compliance with this checklist item.

⁸ See the antitrust suit recently brought by ELI against US WEST in the Federal District Court for the Western District of Washington on June 30, 1997.

**B. Ameritech Has Failed to Provide
Unbundled Switching Or Local Transport.**

DOJ explains in its evaluation that Ameritech admits it is not providing unbundled switching or transport to any new entrant (DOJ Evaluation at 10-21). According to the Department:

"At present, Ameritech is not 'providing' unbundled local switching or unbundled local transport as either a legal or a practical matter to CLECs in Michigan. As a legal matter, Ameritech has refused to provide carriers purchasing unbundled switching with true shared local transport (or 'common transport' as it is often described). In addition, Ameritech has, as a legal matter, not allowed users of unbundled local switching to collect the access charges for long distance service they provide through unbundled network elements, if the CLEC's calls are transported from an interexchange carrier's point of presence ('POP') to the unbundled switch over trunks that also carry Ameritech customer's calls. In our view, these restrictions are inconsistent with Ameritech's obligations under Section 251 and 271 and the relevant orders of the Commission."

The Department goes on to explain that even if Ameritech were correct about its obligations in regard to these elements -- a matter which the Department questions -- "Ameritech still has not made the necessary showing that it possesses the technical capability of successfully provisioning unbundled local switching and transport. Given that fact, we conclude that Ameritech is not yet 'providing' these items within the meaning of the checklist."

DOJ is clearly correct that Ameritech is not currently providing these checklist items as required by Commission orders. Particularly significant is the Department's conclusion that Ameritech has not shown the technical ability to provision these

items. ALTS continues to maintain that Track A compliance requires operational provisioning of each checklist item. However, DOJ's conclusion that Ameritech has not met this item based on Ameritech's inability to demonstrate its provisioning capacity produces virtually the same result.

C. Ameritech Has Failed to Show that It Provides OSS Support for Unbundled Network Elements or Resale.

DOJ has concluded that: "... on the basis of the evidence currently in the record, Ameritech has not satisfied its burden of demonstrating the successful operation of its POTS resale preordering, ordering, and provisioning processes ... With respect to its provision of unbundled local loops, Ameritech's performance is the subject of considerable dispute ... Finally ... the Department believes further testing and operation of Ameritech's ability to provide local switching in combination with other elements is necessary" (DOJ Evaluation at 23-25).

ALTS supports the Department's conclusions concerning Ameritech's failure to provision OSS support in general, and its conclusions in Appendix A in particular. DOJ is correct in linking an RBOC's OSS obligation to the particular nature of the CLEC seeking OSS support. Resellers seeking high volume transactions at start-up will necessarily need highly automated application-to-application interfaces (Appendix A at A-2). On the other hand, CLECs starting with smaller volumes, or with particular needs, such as unbundled loops, may need more basic graphical user interfaces at the start of interconnection until

the underlying process can be economically automated at higher volume levels (id.).⁹

ALTS also supports DOJ's recognition that the CLEC-LEC interface is only one part of the OSS obligation for ILECs: "BOCs will need to automate, to varying degrees, the interaction of these interfaces with their internal OSSs. Such automation often will be critical to the meaningful availability of resale services and unbundled elements" (id.).

D. Ameritech Has Failed To Demonstrate the Existence of Adequate Performance Measurements or Performance Standards for OSS and Other Checklist Elements.

Closely related to the issue of OSS compliance is the general absence of performance measurements and performance standards from Ameritech's application. While this issue is most acute as to OSS compliance, it is also implicated, for example, in Ameritech's inability to explain why trunk blocking for Brooks Fiber trunks is higher than for internal Ameritech trunks. As DOJ correctly concludes: "... proper performance measures with which to compare BOC retail and wholesale performance, and to measure exclusively wholesale performance, are a necessary prerequisite to demonstrating compliance with the Commission's

⁹ See Appendix A at A-3: "we disagree with Ameritech's position that 'manual processing of certain orders, after they are received through the appropriate electronic interface, has absolutely no bearing on compliance with the checklist and the Commission's [rules].' ... Manual processing that results in the practicable unavailability of services or limits at foreseeable demand levels can impede the development of competition, and thus obviously has a direct bearing on compliance with the competitive checklist and the Commission's rules."

'nondiscrimination' and 'meaningful opportunity to compete standards.' Moreover, without a track record of performance described by comprehensive measure, it will be difficult -- if not impossible -- for competitors and regulators to detect backsliding of performance after in-region interLATA entry in authorized" (DOJ Evaluation at A-3-A-4).

ALTS agrees entirely with DOJ on this point. Hard data that is uniformly gathered across all ILECs would perform three essential functions. First, it would permit the benchmarking of ILECs against one another, thereby clearly identifying any outliers. Second, it would permit the establishment of clear, quantitative requirements for Section 251 and Section 271 compliance, rather than vague standards providing dubious consistency. Finally, the same assurances provided by hard data in confirming entry would help prevent any retreat on quality following the grant of an application.

IV. AMERITECH HAS FAILED TO DEMONSTRATE THAT LOCAL MARKETS ARE "FULLY AND IRREVERSIBLY OPEN TO COMPETITION."

The Department of Justice announced in its evaluation of SBC's Oklahoma Section 271 application that: "BOC in-region interLATA entry should be permitted only when the local exchange and exchange access markets in a state have been fully and irreversibly opened to competition" (DOJ Evaluation at 29). In its current evaluation, the Department emphasizes that in considering this standard it: "will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based

entry involving construction of new networks, use of the unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential customers" (*id.* at 30; emphasis supplied). Concerning Michigan, DOJ concluded that: "there is not yet enough local competition in Michigan to warrant a general presumption of openness" (*id.* at 31).

DOJ is clearly correct that its public interest standard has not been met because: "Ameritech remains ... by far the dominant provider of local exchange services, with a near monopoly in its service areas" (*id.*). Out of Ameritech's approximately 1.7M lines served by collocated wire centers, Ameritech has provisioned only 21,321 unbundled loops as of March 1997, barely one percent of these lines (*id.* at 37).

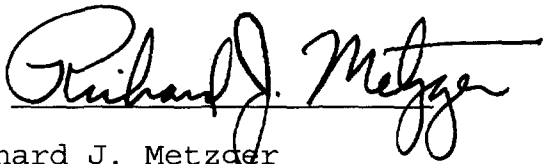
In particular, ALTS shares DOJ's concerns about the absence of final prices (*id.* at 41). Although Ameritech has represented that it will voluntarily follow the Commission's Section 251 rules, it has not volunteered to guarantee TELRIC prices to its Michigan competitors. As the Department notes: "We are particularly concerned where only interim prices that have not been found to be cost-based are available. Competitors will be reluctant to commit their resources to enter a state on a large scale if the economic conditions they will face are highly uncertain and there are incentives for backsliding on the part of the BOC once intelATA relief is granted if final prices have not

already been set" (id. at 42).

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission deny Ameritech's Section 271 application for Michigan.

Respectfully submitted,

By: 

Richard J. Metzger
General Counsel
Association for Local
Telecommunications Services
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 466-3046

July 7, 1997

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Replies by the Association for Local Telecommunications Services was served July 7, 1997, on the following persons by first-class mail or hand service, as indicted.


M. Louise Banzon

Regina M. Keeney*
Chief, Common Carrier
Bureau
Federal Communications
Commission, Room 500
1919 M Street, N.W.
Washington, D.C. 20554*

Brent Olson*
Common Carrier Bureau
Federal Communications
Commission, Room 544
1919 M Street, N.W.
Washington, D.C. 20554*

Melissa Waksman*
Common Carrier Bureau, Room
544
Federal Communications
Commission
1919 M Street, N.W.
Washington, D.C. 20554*

Don Russell
Chief, Telecommunications
Task Force
Antitrust Division
U.S. Department of Justice
Room 8104 Judiciary Center
555 4th Street, N.W.
Washington, D.C. 20001*

Carl Willner
Telecommunications Task
Force
Antitrust Division
U.S. Department of Justice
Room 8104 Judiciary Center
555 4th Street, N.W.
Washington, D.C. 20001*

Frank Kelley
Attorney General
P.O. Box 30212
Lansing, MI 48909

William Celio
Division Director,
Communications
Michigan Public Service
Comm'n
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909-7721

Kelly R. Welsh
John T. Lenahan
Ameritech
30 S. Wacker Drive
Chicago, IL 60606

John M. Dempsey
Craig Anderson
Ameritech Michigan
444 Michigan Avenue
Detroit, MI 48226

John Gockley
Ameritech Communications,
Inc.
9525 West Bryn Mawr
Rosemont, IL 60018

Stephen M. Shapiro
Theodore A. Livingston
Mayer, Brown & Platt
190 S. LaSalle St.
Chicago, IL 60603

Kenneth S. Geller
Mark H. Gitenstein
Mayer, Brown & Platt
2000 Pennsylvania Ave.,
N.W.
Washington, D.C. 2006

Antoinette Cook Bush
Mark Del Bianco
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Aven, N.W.
Washington, D.C. 20005

J. Manning Lee
Vice President, Regulatory
Affairs
Two Teleport Drive, Suite
300
Staten Island, New York
10311

John C. Shapleigh
Brooks Fiber Properties
425 Woods Mill Road South
Suite 300
Town and Country, MO 63017

Susan Jin Davis
MCI Telecommunications
Corp.
1801 Penn Ave., N.W.
Washington, D.C. 20006

Mark C. Rosenblum
AT&T Corp.
295 North Maple Avenue
Room 2345I1
Basking Ridge, NJ 07920

ITS Inc.*
2100 M Street, N.W., Suite
140
Washington, D.C. 20037